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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOSHUA BROOK et al., Plaintiffs and Appellants, v. UNIVERSAL HEALTH SERVICES OF RANCHO SPRINGS, INC., Defendant and Respondent.	E070099 (Super.Ct.No. MCC1600489) OPINION

APPEAL from the Superior Court of Riverside County. Angel M. Bermudez, Judge. Affirmed.

Law Offices of Patricia A. Law and Patricia A. Law for Plaintiffs and Appellants.

Dummit, Buchholz & Trapp, Scott D. Buchholz, Evan A. Kalooky, and Pari H. Granum for Defendant and Respondent.

Plaintiffs are the parents of twins, Joshua and Jessica, who were born premature on December 20, 2014 at Rancho Springs Medical Center (the hospital).[1] Four hours after her birth, Jessica was transferred to the neonatal intensive care unit (NICU) due to a low blood glucose level. She received a sepsis evaluation and antibiotic therapy for infection, and was discharged healthy nine days later. Joshua, whose blood glucose levels were in the normal range, was left in the care of his mother under the supervision of the on-call treating pediatricians (who are independent contractors of the hospital) and nursing staff (who are hospital employees). Joshua was not started on antibiotic therapy until he suffered an apneic event about two days later. The antibiotics did not stop what turned out to be a listeria infection, and Joshua passed away on March 1, 2015.

Plaintiffs sued the hospital and the physicians involved in Joshua's medical care for professional negligence. The hospital filed a summary judgment motion and produced evidence the nursing staff did not breach the standard of care and did not cause or contribute to Joshua's death. Plaintiffs opposed the motion, relying on declarations from a neonatologist and a registered nurse to establish triable issues of fact on breach and causation. The trial court found plaintiffs' evidence on causation did not raise a triable issue of fact and entered judgment for the hospital. We conclude plaintiffs' declarations failed to establish a triable issue of fact as to causation, and we affirm.

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[1] Rancho Springs Medical Center operates under the dba Universal Health Services of Rancho Springs, Inc.

I

FACTS

A. *Undisputed Facts*

Plaintiffs (mother, Jennifer Nhan, and father, Joshua Brook) arrived at the hospital at 1:30 a.m. on December 20, 2014. Nhan's chief complaints were contractions and blood spotting. Her lab tests revealed an elevated white blood cell count (19.2, normal range is 3.4-10.8). At 4:50 a.m., Nhan tested negative for group B streptococcus. Her amniotic fluid was clear before delivery and she was not given antibiotics during labor. Joshua was born at 8:53 a.m. and his twin sister Jessica was born seven minutes later, at 9:00 a.m. They were born at 35 weeks and three days gestation. Both weighed just over 2,000 grams—Joshua 2,100 and Jessica 2,030 grams.

Dr. Claudia Camacho was assigned as the twin's on-call pediatrician. She issued the hospital's standard orders for newborns, which, among other things, requires automatic transfer to the NICU if the child is born at less than 35 weeks gestation, weighs less than 2,000 grams, or requires IV therapy (e.g., "for treatment of neonatal hypoglycemia [or to] rule out sepsis"). The orders also require nursing staff to notify the physician if the baby suffers respiratory distress or runs a fever (has a temperature greater than 100.4 degrees Fahrenheit). The orders also say to check the baby's rectal temperature if the axillary temperature is greater than 99.4 degrees Fahrenheit.

Joshua had a newborn assessment at 9:35 a.m. His temperature was 99.1 and his results were normal. At 1:45 p.m., his axillary temperature was 99.5, however, his

records do not contain a rectal temperature, indicating the nursing staff did not take one (in violation of the standing orders).

Two hours earlier, at approximately noon, Jessica was transferred to the NICU because her blood glucose level tested low at 34 mg/dL (normal range is 40-60 mg/dL). Her medical records say she was admitted to the NICU due to "prematurity, hypoglycemia and sepsis evaluation." She was successfully treated for sepsis with antibiotics and discharged a little over a week later, on December 29.

The nursing staff assessed Joshua's vital signs at regular intervals. His blood glucose levels consistently tested within the normal range. Around noon the day after the twins' birth (December 21), Dr. Camacho assessed Joshua and concluded he was normal, except he was jaundiced. Joshua's medical records reflect that from 7:00 a.m. to 11:00 p.m. on December 21, he consumed only 57 ml of formula, and he produced only one stool from 11:00 p.m. on December 20 to 11:00 p.m. on December 21. At 5:00 a.m. on December 22, Dr. Sylvia Johnson performed a discharge examination of Joshua. She found he was normal, with the exception of prematurity and color. At 6:37 a.m., she issued an order that he could be routinely discharged home.

Later that day (December 22), around 2:00 p.m., Joshua suffered an apneic event. One of the nurses reported he had turned blue while Nhan was trying to breast feed him, and had become "tachypneic," meaning he was exhibiting rapid breathing. The nursing note says: "[B]aby was at breast and mom called out [because] baby was blue. Placed on radiant warmer with [cardiac] monitor and pulse ox. Baby was stimulated to cry and

color improving with blow by o2 flo2 100%. Spoke with Dr. Johnson at [2:05 p.m.] and [advised] baby was dusky in room and required stimulation and blow by o2 to recover. [Advised] baby now [tachypneic]." Around the same time, Joshua's test results showed an elevated blood glucose level, at 63 mg/dL. At 2:26 p.m., he was transferred to the NICU "in stable condition," with a blood glucose level of 69 mg/dL. At 4:00 p.m., he turned dusky again. His blood glucose level had risen to 129 mg/dL.

About 6:30 p.m., Dr. Lily Martorell-Bendezu completed an examination of Joshua. Her initial impression was his apnea was "secondary to prematurity." However, further test results led her to suspect Joshua was infected with meningitis, and they began treating him with antibiotics at 8:00 p.m. on December 22.

On December 25, test results confirmed Joshua was infected with listeria, and he was diagnosed with neonatal sepsis and meningitis. Despite aggressive treatment, his health continued to decline, and in mid-January plaintiffs decided to bring him home with hospice care and allow a natural death.

In May 2016, plaintiffs sued the hospital and the physicians involved in Joshua's care for professional negligence. The hospital moved for summary judgment.

B. *The Hospital's Evidence*

The hospital submitted the declaration of neonatologist Dr. Alan Bedrick, who has practiced medicine for 34 years, was the medical director of the NICU and chief of neonatology at Franklin Square Hospital Center in Baltimore, and teaches pediatrics at the University of Arizona College of Medicine. Dr. Bedrick said nonphysician staff are

not responsible for "recommend[ing] the appropriateness of medical treatment performed by the physician[s]," who are "independent contractors who maintain privileges to practice in the hospital setting." Dr. Bedrick concluded the nursing staff had complied with the standard of care while treating Joshua and there was no evidence they caused or contributed to Joshua's death.

C. *Plaintiffs' Evidence*

Plaintiffs submitted two expert declarations in opposition to the hospital's summary judgment motion. One was from Dr. Jack Sills, a neonatologist who served as the medical director of the NICU at University of California, Irvine, where he is currently a clinical professor in the pediatrics department. Dr. Sills concluded Dr. Camacho breached the standard of care by failing to obtain Jessica's sepsis evaluation results from the NICU and order the same evaluation for Joshua. He also concluded the standard of care required the nursing staff to inform Dr. Camacho that Joshua was feeding and voiding poorly and "[t]here is no evidence that information was brought to the pediatrician's attention." He concluded that if "the same labs [drawn on Jessica] had been drawn on Joshua, to a reasonable degree of medical probability, they would have yielded results that would have caused Dr. Camacho to transfer the baby to the NICU along with his sister and start the same antibiotics."

The other declaration was from Kristy Fisher, a registered nurse with a national certification in inpatient obstetrics and 16 years of experience in high risk obstetrics, labor, delivery, and special care nursery. She concluded the nursing staff violated the

standard of care (and the hospital's standard orders) on December 20, 2014 at 1:54 p.m. by failing to record—which means they never took—Joshua's rectal temperature in response to his axillary temperature reading of 99.5 degrees. She said "[s]tudies show" that rectal temperatures are higher than axillary temperatures 98 percent of the time. She concluded it was "likely" Joshua's rectal temperature at that time would have been "closer to 100.5." In addition, she agreed with Dr. Sills that nursing staff should have reported Joshua's poor feeding and voiding to Dr. Camacho. Finally, she concluded the hospital violated the standard of care by not having a standard order requiring automatic transfer to the NICU for any baby born at 35 weeks and three days gestation. She said, "[i]n any hospital that I have been affiliated with over my career, a 35 and 3/7 week newborn would go to the NICU for evaluation automatically."

D. *The Court's Ruling*

The court found plaintiffs had demonstrated a triable issue of fact as to whether the nursing staff violated the standard of care but also found they had failed to present any evidence that any of the nurses' actions or omissions "caused or contributed to Joshua's injury and eventual death." The court concluded Dr. Sill's testimony about causation was "limited to his opinion that if Joshua had been admitted to NICU *at the same time* as Jessica and if the *same* antibiotic protocol administered to Jessica had been initiated, Joshua would have survived." (Italics added.) "Dr. Sills offers no opinion as to what the effect on Joshua's condition would have been had the nursing staff reported his poor feeding and lack of voids and stools on December 21, 2014. That is, there is no

opinion that a referral to NICU *after the symptoms of Joshua's infection came to light* would have changed the outcome." (Italics added.)

In addition, the court discounted Nurse Fisher's testimony about the nursing staff's violations of the standard of care. It found her testimony that the hospital should have a standing order automatically transferring to the NICU a newborn with a gestation period of 35 weeks and three days was "unsupported," noting she could have, but had not, set forth comparable standards at other hospitals. It found her testimony that Joshua's rectal temperature was likely close to 100.5 when his axillary was 99.5 "speculative and not supported by competent medical testimony." The court further reasoned that Dr. Sills had not linked the failure to take a rectal temperature to causation in any event. "Dr. Sills offers no opinion as to whether Joshua's condition would have improved had the nursing staff reported the fever to [Dr. Camacho] at 2 p.m. on December 20." "Stated simply, Dr. Sills offers no opinion as to *when it became too late to reverse the progression of Joshua's infection*." (Italics added.) The court entered judgment in favor of the hospital, and plaintiffs timely appealed.

II

ANALYSIS

A trial court properly grants summary judgment when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine

whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

A defendant who moves for summary judgment bears the initial burden to show the action has no merit—that is, "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subds. (a), (p)(2).) Once the defendant clears this initial hurdle, the burden shifts to the plaintiff to demonstrate a triable issue of material fact. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

To succeed on a claim of professional negligence, the plaintiff must show, among other things, the defendant breached the standard of care and the breach caused the plaintiff to suffer harm. (*Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1137 [there must be "a causal connection between the negligent conduct and the resulting injury"].) "[C]ausation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case." (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402.)

We review the trial court's ruling on a summary judgment motion de novo, liberally construing the evidence in favor of the party opposing the motion and resolving all doubts about the evidence in favor of the opponent. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) However, "[a]s with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and,

therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed." (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230.)

First, Plaintiffs assert they "do not believe that the [hospital] established their right to judgment *by conclusively negating* the necessary element of causation." (Italics added.) In other words, they argue the court erred in granting summary judgment because the hospital did not carry its initial burden. But plaintiffs misunderstand a moving defendant's burden at the summary judgment stage. As our Supreme Court explained in *Aguilar*, California's summary judgment law "[no] longer require[s] a defendant moving for summary judgment to *conclusively negate* an element of the plaintiff's cause of action." (*Aguilar, supra*, 25 Cal.4th at p. 853, italics added.) "[A]ll that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action—for example, that the plaintiff cannot prove element *X*. Although he remains free to do so, the defendant need not himself conclusively negate any such element—for example, himself prove *not X*." (*Id.* at pp. 853-854, fns. omitted.)

Plaintiffs argue the hospital's only expert opinion regarding causation was that the nursing staff did nothing wrong, but they are incorrect on that point. After reviewing Joshua's medical records and the deposition of the NICU doctor who performed his infectious disease consultation, Dr. Bedrick concluded that none of the nurses' actions or omissions contributed to Joshua's death. He did not, as plaintiffs contend, simply

conclude the nursing staff did not breach the standard of care. Dr. Bedrick's testimony was sufficient to shift the burden to plaintiffs to demonstrate a triable issue of fact on causation.

Plaintiffs argue they *did* carry their burden, by presenting evidence that the hospital should have had a policy of automatic NICU transfer for babies born at 35 weeks and three days. Plaintiffs assert, "the issue for the Appellate Court is whether . . . [i]t is below the standard of care for the hospital not to have a standing order that this pre-term baby be taken to the NICU immediately after birth for evaluation." They argue that if Joshua would have received the same sepsis evaluation in the NICU that Jessica had received, "he would have been started on the same antibiotic regimen as his sister and he would have survived."

We see two problems with this argument. First, the record contains no evidence to support a finding that if Joshua had been transferred to the NICU at the same time as Jessica, then the same sepsis evaluation that was ordered for her would have been ordered for him. Presumably, this is because in the hours after their birth Joshua was not exhibiting signs of infection (like a low blood glucose level), but his twin was. Thus, even if Nurse Fisher's declaration created a triable issue as to whether the failure to transfer Joshua to the NICU at the same time as Jessica was a breach of the standard of care, there is no evidence the breach caused Joshua any injury.

Second, as the trial court correctly concluded, there is insufficient evidentiary support for Nurse Fisher's opinion that the hospital's NICU transfer policy fell below the

standard of care. Expert opinion "may not be based on . . . factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) In other words, "an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." (*Ibid.*) Nurse Fisher stated that every hospital she has been affiliated with in her 16 years of experience has a policy requiring automatic NICU transfer for babies born at 35 weeks and three days. However, she did not say which or how many hospitals she has worked at during her career or explain why those hospitals established the policies. As a result, she did not give the trial court a sufficient basis in evidence and reason to conclude that not having the policy was a breach.

At times in their opening brief plaintiffs reference the nursing staff's failure to take Joshua's rectal temperature and to report his poor feeding and voiding as violations of the standard of care, but they do not argue those violations created a triable issue as to causation. However, for the sake of thoroughness, we explain why, even assuming those omissions are breaches, there is insufficient evidence they contributed to Joshua's death. The trial court correctly concluded Nurse Fisher's opinion Joshua's rectal temperature would have been 100.5 (which would have then required them to report the fever to Dr. Camacho) was speculative. She made a vague reference to "studies" that show rectal temperature is higher than axillary temperature 98 percent of the time, but she did not

identify which studies or provide any information about *how much higher* the rectal temperatures tend to be. As a result, the fact finder is left wondering how she reached her estimate of 100.5. (Notably, Joshua's axillary temperatures directly following the 99.5 reading were 98.4 at 4:30 p.m. and 97.7 at 8:14 p.m., suggesting he was not running a fever earlier in the day.)

In addition, plaintiffs provided no evidence Joshua would have fared any differently if he did, in fact, have a fever and the nursing staff reported it to Dr. Camacho at 2:00 p.m. on December 21, or if they later personally reported Joshua's poor feeding and voiding.[2] As the trial court correctly noted, Dr. Sills did not establish a causal nexus between Joshua's death and the nurses' failure to personally report Joshua's feeding and voiding schedule, nor did he provide any opinion about when it became too late to transfer Joshua to the NICU. Dr. Sills opined only that had Joshua received the same treatment as his twin, to a reasonable degree of medical certainty, he would have survived. Construing his declaration liberally, Dr. Sills might show a causal connection for *Dr. Camacho's* failure to order a sepsis evaluation for Joshua after Jessica's came back positive, but he provided no such causal link for any of the nurses' actions or omissions.

[2] We say *personally* reported because the nurses noted his feeding and voiding patterns in his medical record, and the plaintiffs presented no evidence indicating Dr. Camacho or Dr. Johnson failed to review those notes.

III

DISPOSITION

We affirm the judgment as to the nursing staff. Each party shall bear their own costs on appeal.

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SLOUGH
Acting P. J.

We concur:

FIELDS
J.

MENETREZ
J.